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In the Supreme Court of the United States.

OCTOBER TERM, 1976.

No. **76-1078**

RICHARD DEVINCENT AND ROBERT VISCONTI,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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No.

RICHARD DEVINCENT AND ROBERT VISCONTI,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Petitioners Richard DeVincent and Robert Visconti respectfully pray that a writ of certiorari issue to review the judgments and opinion of the United States Court of Appeals for the First Circuit entered on December 8, 1976.

Opinion Below.

The opinion of the Court of Appeals for the First Circuit has not yet been published in the official reports. A copy of the opinion is attached hereto as Appendix A (App. 1a-8a).

Jurisdiction.

The judgments sought to be reviewed were entered by the United States Court of Appeals for the First Circuit on December 8, 1976. No petition for rehearing was filed because of the limitation of such petitions to new matters under Local Rule 15 of the First Circuit.

Pursuant to applications filed by each Petitioner, this Court, per Brennan, J., as Circuit Justice, granted extensions of time to and including February 4, 1977, for each petitioner to file a petition for writ of certiorari.

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1) to review the judgment of the Court of Appeals by writ of certiorari.

Questions Presented for Review.

1. Under the statutory presumption contained in 18 U.S.C. § 892(b), does the use of a creditor's reputation as to collection practices to support a presumption regarding his state of mind with respect to a particular loan violate due process of law?

2. Under the statutory presumption contained in 18 U.S.C. § 892(b), does the existence of a civilly uncollectible loan in excess of $100 at an interest rate in excess of 45 per cent

support an inference beyond a reasonable doubt that the lender contemplated the use of criminal means of collection at the time the loan was made?

3. Under the statutory presumption contained in 18 U.S.C § 892(b), does it follow more likely than not upon proof of the existence of a civilly uncollectible loan in excess of $100 at an interest rate in excess of 45 per cent that the lender contemplated the use of criminal means of collection at the time the loan was made?

4. In a prosecution under 18 U.S.C. § 892, does the potential prejudice to a defendant creditor from admitting into evidence testimony by a debtor about the defendant creditor's prior indictment for murder require the trial judge to consider, before admitting the evidence, a prior inconsistent statement by the debtor which if true would render the evidence wholly inadmissible?

Constitutional Provision and Statute Involved.

The due process clause of the Fifth Amendment to the United States Constitution is involved. The Fifth Amendment provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process

of law; nor shall private property be taken for public use, without just compensation."

18 U.S.C. §§ 891 and 892 are involved. The text of those sections is attached hereto as Appendix B (App. 9a-12a).

Statement of the Case.

The petitioners were both charged with various violations of 18 U.S.C. Chapter 42 (Extortionate Extensions of Credit). Following a jury trial in the District of Massachusetts before Caffrey, C.J., both Petitioners were convicted of conspiring to make and of making an extortionate extension of credit in the form of a $700 loan to Peter J. Pallotta in violation of 18 U.S.C. § 892. They were acquitted of the remaining charges.

In view of the likelihood that the government would attempt to introduce evidence at the trial relating to the past bad acts and possible reputations of the Petitioners, motions were filed requesting the court to co duct a preliminary examination of such evidence to determine whether it was admissible. The motions and the accompanying memorandum of law listed various factors necessary properly to evaluate the probative value against the prejudicial impact of the anticipated evidence. Among these factors listed was the importance of assessing the reliability of the proffered evidence prior to its admission.

At the trial evidence was introduced by the government to establish the amount of the loan and the interest rate on the loan (4 per cent per week). The parties stipulated that the loan was uncollectible by civil process in the Commonwealth

of Massachusetts. The remaining evidence against the Petitioners came essentially from the testimony of Mr. Pallotta.

Pallotta testified not only to the circumstances of the loan but also to his beliefs about the Petitioners' criminal records and reputations. He testified to knowing of Petitioner Visconti's having been convicted of loansharking and to having been told that Visconti was a "loanshark enforcer." He testified to knowing of Petitioner DeVincent's twenty-year-old armed robbery conviction and a previous conviction for loan sharking, and to DeVincent's reputation as a "head-crusher, loanshark enforcer."

When Pallotta testified that he knew DeVincent had ten years earlier been indicted for murder, the court admitted that testimony into evidence over the objections of defense counsel. During the bench conference at which the court heard argument as to the admissibility of the evidence, counsel for Petitioner DeVincent attempted to raise the fact that Pallotta had previously made statements indicating that he was unaware of the indictment at the time the loan was made. The statements had been made in a telephone conversation with Edward Miani, which federal authorities had monitored and recorded. The court refused to consider the prior statements on the question of admissibility and stated that those statements were relevant only to the jury's assessment of Pallotta's credibility.

In charging the jury, the court gave an instruction, not requested by the government and based on 18 U.S.C. § 892(b), that the Petitioners could be found guilty of making extortionate extensions of credit solely upon proof that a loan in excess of $100 was made by Petitioners at a rate of interest in excess of 45 per cent per annum, that the loan was civilly uncollectible, and that Mr. Pallotta had a reasonable belief either that the Petitioners had used criminal means of enforcement in the past or that they had a reputation for doing so.

Throughout the trial the court gave repeated instructions that the evidence of Petitioners' past acts and reputations was admitted for the limited purpose of establishing Pallotta's state of mind and that it was to be considered for no other purpose. The court repeated that instruction in its charge to the jury.

Reasons for Granting the Writ.

A. The Opinion of the Court of Appeals for the First Circuit is in Conflict with the Congressional Intent Embodied in the Statutory Presumption, the Holding of this Court in Michelson v. United States, 335 U.S. 469 (1948), and the Repeated Cautionary Instructions of the Trial Judge.

In 18 U.S.C. § 892(b) Congress established a statutory presumption that an extension of credit could be found to have been "extortionate" upon proof of four basic facts: (1) the civil uncollectibility of the extension of credit; (2) an interest rate in excess of 45 per cent per annum; (3) the debtor's belief that the creditor had used or had a reputation for using criminal means of collection; and (4) a total amount extended in excess of $100.

While the statute appears on the surface to create a single presumption, using the four basic facts to support the single presumed fact of "extortion," there are under the statute not one but two presumed facts. Section 891(6) of the statute defines "extortionate" as a function of the states of mind of both the creditor and the debtor at the time an extension of credit is made. Both must have the "understanding" that criminal means of enforcement could be used, "understanding"

not in the sense of agreement but rather as individual comprehension. *United States* v. *Annoreno*, 460 F. 2d 1303, 1308-9 (7th Cir.), *cert. denied*, 409 U.S. 852 (1972). In the opinion below (App. 3a, footnote 2), the Court of Appeals recognized that the understanding of each party to the transaction was a separate element of the crime.

Thus the four basic facts enumerated in Section 892(b) are intended to support presumptions of (1) the creditor's understanding of the transaction; and (2) the debtor's understanding of it. This is clear from the Conference Committee Report on the legislation which became 18 U.S.C. Chapter 42 (Extortionate Credit Transactions). In that report the Committee isolated the separate inferences in the presumption and pointed out which basic facts supported each inference.

> "In arms length transactions, people simply do not lend sums of money at exorbitant rates of interest under circumstances where they cannot enforce the obligation to repay. Where the prosecution has shown the absence of legal means to enforce the obligation, it is a reasonable inference, in the absence of evidence to the contrary, that illegal means were contemplated." Conf. Rep. No. 1397, 90th Cong., 2d Sess. (May 20, 1968), 1968 U.S. Code Cong. & Admin. News, 2021, at 2026-27.

The inference as to the creditor's state of mind is clearly made to rest on only three of the four basic facts in the statute. The remaining factor, the debtor's beliefs about the creditor's collection practices, is used only to infer the debtor's state of mind.

> "Any debtor who deals with a creditor under these circumstances, knowing or reasonably believing that the

> creditor has used extortionate means in the past, may be fairly surmised to know what he is getting into." 1968 U.S. Code Cong. & Admin. News, at 2027.

This exclusion of the debtor's beliefs about the creditor's reputation from the inference to the creditor's state of mind is consistent with the proscription in *Michelson* v. *United States*, 355 U.S. 469, 475-76 (1948), against the use of reputation as a part of the government's case-in-chief to prove the defendant's propensity to commit the crime with which he is charged. That proscription is reflected in the repeated instructions by the trial judge that the jury was not to consider the debtor's testimony as to his beliefs about the creditors' reputations and past practices for any purpose other than establishing the debtor's own state of mind.

Yet in its summary affirmation of the constitutionality of the statutory presumption in Section 892(b) "[u]nder either a rational connection or a reasonable doubt standard" (App. 4a), the Court of Appeals completely ignored the prohibitions of this Court and the caution of the trial judge. Despite having, only two pages before, discussed the understanding of each party as a separate element of the offense, the Court of Appeals upheld the statute as though it involved no more than a single permissible inference from the four basic facts.

> "When a man with a reputation for violent collection tactics loans more than $100 at an exorbitant rate of interest, and the loan cannot be collected by legal means, we think it highly probable that the loan is 'extortionate' within the meaning of § 892." (App. 4a.)

The superficial appeal of the view expressed by the Court of Appeals comes from reading "extortionate" in its common meaning rather than as a term with an explicit statutory definition. By not discussing the presumption in light of the two separate essential elements included in the term "extortionate," the Court of Appeals *sub silentio* employed the reputations of the Petitioners to prove their states of mind. The court had in fact earlier stated its belief that Section 892(b) was enacted specifically to overcome the difficulty of proving the "understanding of the creditor" directly (App. 2a).

While the error of the Court of Appeals in failing to assess the constitutionality of the statutory inference as to the creditors' states of mind without using the evidence of their reputations may have been inadvertent, under Local Rule 15 of the First Circuit the Petitioners were precluded from raising the matter in a petition for rehearing because the argument as to the proper analysis of the statutory presumption had already been presented to that court in the briefs of appellants. Thus, the Petitioners' only recourse is to petition this Court for a writ of certiorari so that this Court can either make its own determination of the constitutionality of the statutory presumption or remand the case to the Court of Appeals to allow that court to revise its opinion in the light of the conflicts with legislative intent, *Michelson*, and the instructions of the trial judge.

B. The Importance of a Definitive Determination of the Constitutionality of the Statutory Presumption in 18 U.S.C. § 892(b).

Chapter 42 (Extortionate Credit Transactions) of Title 18, United States Code, was passed by Congress as an integral part of the Consumer Credit Protection Act, Pub. L. 90-321, May 29, 1968, 82 Stat. 159, and was considered to be one of

the more important protections afforded the consumer under that act. See 114 Cong. Rec. 14390. Chapter 42 was enacted and its constitutionality upheld on the rationale that the loan sharking activities of organized crime were a serious impediment to the operation of the bankruptcy laws and had a substantial impact on interstate commerce. See: 1968 U.S. Code Cong. & Admin. News, at 2025-26; and *Perez* v. *United States*, 402 U.S. 146 (1971). The loan sharking provisions of the act were directed at "one of the principal sources of revenue of organized crime," and Section 892(b) was enacted "in order to provide the Department of Justice with the means for enforcing [those] provision[s]." 114 Cong. Rec. 14490.

Despite the obvious importance of Chapter 42 in combatting organized crime and the essential role in that effort which Congress envisioned for Section 892(b), the opinion below is the first reported decision dealing with the constitutionality of the statutory presumption. While it is unclear why no federal court appears to have dealt with this issue previously, whether because trial judges have avoided instructing juries on the basis of the presumption or because the issue simply was never raised by a defendant, it would be reasonable to assume that in future prosecutions under the statute trial judges, assuming in reliance upon the opinion below that the constitutional issue is settled, may well be inclined to instruct every jury on the statutory presumption. The danger of this occurring lies not only in the possibility that in the future persons accused of violating the statute may be convicted by the use of a constitutionally questionable provision of that law but also in the very real risk that numerous future convictions may have to be overturned because the issue of the constitutionality of the statutory presumption was not properly resolved when first presented.

In addition to the importance of the questions presented to law enforcement, there is the importance of those questions to

constitutional law generally. In *Leary* v. *United States*, 395 U.S. 6 (1969), this Court established a minimum constitutional standard by which presumptions in criminal cases were to be governed. Unless a presumed fact can be said to flow more likely than not from the basic facts upon which it is made to depend, the presumption is unconstitutional. In *Leary* (395 U.S. at 36), and again in *Barnes* v. *United States*, 412 U.S. 837, 842-43 (1973), this Court expressly reserved the question whether, when the presumed fact is also an essential element of the crime charged, presumptions in criminal cases must also meet the more rigorous beyond-a-reasonable-doubt standard. Cf. *In re Winship*, 397 U.S. 358 (1970). Petitioners have been able to find no case since *Barnes* was decided in which a presumption was found to meet the more-likely-than-not test but to fail the beyond-a-reasonable-doubt test.

When the presumption in Section 892(b) as to the creditor's contemplation of criminal means of collection is viewed as based upon only the amount of money involved, the interest rate on the loan and the civil uncollectibility of the loan — and not upon the creditors' reputations as well — it becomes apparent that the presumption may well fall in that gray area between the *Leary* test and the *Winship* standard if it passes muster under *Leary* at all.

C. The District Court's Refusal to Consider the Prior Inconsistent Statement of the Debtor Witness on the Question of the Admissibility of the Witness's Testimony as to his Knowledge of the Creditor Defendant's Past Indictment for Murder was Improper and was Inconsistent with Decisions of the Courts of Appeals for the Seventh, Eighth, Tenth and District of Columbia Circuits.

As the Petitioners pointed out to the District Court in the memorandum of law which was submitted with their motions

for preliminary examination of evidence of past crimes and bad acts, the ultimate decision to admit such evidence is a matter of judicial discretion, but a trial court is required to take into account and to weigh a number of factors in making its determination on admission. In addition to other considerations (such as relevance, probative value, remoteness and prosecutorial need) to be weighed against the prejudice to a defendant, a trial court should assess the reliability of the evidence sought to be admitted. *United States* v. *Bailey*, 505 F. 2d 417, 420 (D.C. Cir. 1974), *cert. denied sub nom. Sloan* v. *United States*, 420 U.S. 961 (1975).

At the trial of the instant case the Petitioners did not dispute that the Petitioner DeVincent had in fact been indicted (and acquitted) for murder some ten years earlier. However, there was a serious question whether Pallotta knew of the indictment at the time the loan was made.

The District Court's refusal to consider Pallotta's prior inconsistent statements on the question of admissibility not only conflicts with the decision of the District of Columbia Circuit in *Bailey*; it is also inconsistent with decisions in the Seventh, Eighth and Tenth Circuits on a closely related question. In *United States* v. *Ostrowsky*, 501 F. 2d 318, 321 (7th Cir. 1974), *United States* v. *Clemons*, 503 F. 2d 486, 490 (8th Cir. 1974), and *United States* v. *Burkhart*, 458 F. 2d 201, 205 (10th Cir. 1972), those courts held that when evidence of prior crime is being used to prove an element of the crime charged, the risk of prejudice requires that that evidence meet a "clear and convincing" standard of proof before it is admitted.

In those cases, the relevance of the proffered evidence depended upon the fact that the other crimes were committed rather than, as in the case at bar, upon the fact of the witness's knowledge of the other occurrence, but logic requires imposition of the same standard of reliability in both instances. In either situation the risk of undue prejudice is the reason for

caution. To guard against this risk the courts have taken what would otherwise be merely a question of credibility (if the evidence of other crime is in the form of testimony) to be decided by the jury and made it a preliminary matter to be determined, in the first instance at least, by the trial judge. If the ability of the evidence to establish the proposition for which it is offered is less than "clear and convincing," it must be excluded under *Ostrowsky*, *Clemons* and *Burkhart*. The same rule should apply, whether the proposition sought to be established is the fact of the other crime or the fact of the witness's knowledge, where the risk of prejudice is the same.

In the present case, if the debtor witness, Pallotta, knew of the murder indictment at the time the loan was made, then that evidence may certainly have been relevant to Pallotta's state of mind at the time the loan was made. On the other hand, however, if he did not know of the indictment at the time, as indicated by his statements during the phone conversation with Miani, the fact of DeVincent's indictment had absolutely no relevance whatever to the trial of the case.

The District Court was of the view that the prior inconsistent statements related only to the issue of credibility as a question of fact to be resolved by the jury. The court thus ignored the fact that, although the jury might determine that Pallotta did not know of the indictment and that his understanding of the transaction with Petitioners was not affected thereby, the prejudice from the jury's knowledge of the murder indictment would remain undiminished.

At one point in the opinion below, the Court of Appeals suggests that the trial court may have reasoned that the testimony about the murder indictment was remote and cumulative and that therefore any prejudicial impact would be minimal as well. The testimony was cumulative, the Court of Appeals felt, because of other testimony by Pallotta that he believed DeVincent to be a "head-crusher, loanshark enforcer"

and that he knew of DeVincent's and Visconti's prior convictions for loan-sharking (App. 7a).

That analysis conflicts not only with reason but with the record as well, and with the trial judge's own explanation of his reasons for admitting the murder-indictment testimony. After hearing argument from counsel at a bench conference on the admissibility of the evidence, Judge Caffrey stated:

> "Let me tell you this: In terms of the state of mind of the victim, I have received a threatening letter right within the last two weeks from a fellow I gave a long sentence to who was previously acquitted in Suffolk. And, if you don't think I have in mind the fact that that fellow was charged with murder and was acquitted as bearing on the type of guy that is writing me threatening letters, you are not very realistic." Tr., First Day of Jury Trial, p. 46.

That assessment of the impact of the murder indictment indicates that it was far from being "remote and cumulative."

Also the existence of the murder indictment would have prejudiced the jury far more than Pallotta's bald assertions that DeVincent was thought to be a "head-crusher." Contrary to the Court of Appeals statement, at the time the murder indictment was first mentioned by Pallotta, there had been no evidence presented of DeVincent's loan-sharking conviction. Visconti's so-called "loan-sharking conviction" was a conviction for violating the state small loans act which has nothing to do with violence or extortion but punishes the making of loans under $3,000 at interest rates in excess of 12 per cent per annum. In the light of Judge Caffrey's own comments it can hardly be doubted that a jury would be

prejudiced by the knowledge that a man accused of extortion had once been indicted for murder.

Conclusion.

For the foregoing reasons, this petition for writ of certiorari should be granted: to resolve the issue of the constitutionality of the statutory presumption in 18 U.S.C. § 892(b); to determine, possibly, whether presumptions in criminal cases must meet the beyond-a-reasonable-doubt standard; and to decide whether upon request matters which cast doubt upon the reliability of evidence relating to past crimes or bad acts by a criminal defendant must be considered by a trial judge prior to ruling on the admissibility of that evidence.

Respectfully submitted,

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Appendix A.

United States Court of Appeals for the First Circuit

Nos. 76-1224 and 76-1225

UNITED STATES OF AMERICA,
APPELLEE,
v.
RICHARD DEVINCENT a/k/a VINNIE,
APPELLANT.

UNITED STATES OF AMERICA,
APPELLEE,
v.
ROBERT VISCONTI,
APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. ANDREW A. CAFFREY, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
CLARK*, *Associate Justice*, U.S. Supreme Court
(Ret.), and MCENTEE, *Circuit Judge*.

Brian J. McMenimen for Robert Visconti, appellant.
Stephen M. Salon, with whom Robert Erwin Silver, Andrej Thomas Starkis, and Salon, Silver, McCabe & Sidel were on brief for Richard DeVincent, appellant.
Dennis A. Winston, Attorney, Department of Justice, with whom *James N. Gabriel*, United States Attorney, *Martin Boudreau*, Special Attorney, Justice Department, and *Mervyn Hamburg*, Attorney, Department of Justice, were on brief, for appellee.

December 8, 1976

COFFIN, *Chief Judge*. The appellants were convicted of conspiring to make, and of making, an extortionate exten-

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* Sitting by designation.

sion of credit in violation of 18 U.S.C. § 892(a). The statute is a recent one, aimed at "loan sharks". Several of the issues raised by appellants revolve around the definition of an "extortionate" extension of credit. 18 U.S.C. § 891(6) states that

> "[a]n extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person reputation, or property of any person."

Recognizing that it might be hard to prove the "understanding of the creditor" directly, Congress declared in 17 U.S.C. § 892(b) that "if it is shown that all the following factors were present in connection with the extension of credit in question, there is prima facie evidence that the extension of credit was extortionate . . . ." Congress then listed four factors: that repayment is unenforceable through civil judicial processes; that the loan requires interest greater than 45 per cent a year; that the loan, added to the borrower's existing debts to the same lender exceeds $100; and that the debtor reasonably believes either that the lender has used extortion to collect other debts or that the lender has a reputation for doing so.

The appellants argue that the district court improperly construed these provisions when it instructed the jury in the following language:

> "I want to tell you there are two ways in which the government can prove the extensions of credit were extortionate, if you find the extensions of credit were made: The government can prove extensions of credit were extortionate either by direct evidence of the ac-

> tual belief of Pallotta as to the defendants' collection practices or by establishing the following four facts:" [The court then paraphrased § 892(b).]

Appellants object that in outlining the first method of proof, the judge should have referred to the creditor's understanding that violence would be used to collect the loan. To prevail with this argument, they must show that the omission was plain error, for they made no objection when the instruction was given. F. R. Crim. P. 52(b). We agree that the statute makes the understanding of both the creditor and the debtor crucial to proving a substantive violation of this section. *Cf. United States* v. *Annoreno,* 460 F.2. 1303, 1310 (7th Cir.), *cert. denied,* 409 U.S. 852 (1972). We do not, however, believe that this instruction was plain error. Read as a whole, the charge to the jury conveyed the statute's requirements. At several earlier points in his instruction the judge properly charged that the government must prove the creditor's understanding. He talked of the "mutual understanding" of creditor and debtor, and of an "understanding between" the two.[1] Twice he repeated the statutory definition found in §891(6).[2] The judge's later lapse was, therefore, a harmless one. Particularly is this so when we consider the context of the remark: the court mentioned the "direct" method of proof under § 891(6) only as an introduction and contrast to the less direct route provided by § 892(b).

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[1] These instruction may have given the appellants more than they were due. The statute does not require a mutual agreement that force will be used to collect the debt; "understanding" is used in the sense of comprehension, not agreement. *United States* v. *Annoreno, supra,* 460 F.2d at 1308-09.

[2] These passages also dispose of appellants' argument that the jury was not informed that the creditor's understanding is a separate element of the crime and must be proven beyond a reasonable doubt. It is true that the instructions generally gave more attention to the debtor's understanding; but a reading of the record reveals that much of the defense was devoted to casting doubt on the debtor's claim that he expected violent collection tactics from these lenders. Understandably, the court's instructions reflect the focus of the parties.

Appellants also find error in the second part of the quoted passage, which is based on § 892(b). Their broadest ground is the unconstitutionality of the presumption[3] that these four factors show the loan to have been extortionate. There are constitutional limits on the use of presumptions in the criminal law. *Tot* v. *United States,* 319 U.S. 463, 467-68 (1943); *Leary* v. *United States,* 395 U.S. 6, 29-44 (1969). But the presumption created by § 892 does not transgress those limits. When a man with a reputation for violent collection tactics loans more than $100 at an exorbitant rate of interest, and the loan cannot be collected by legal means, we think it highly probable that the loan is "extortionate" within the meaning of § 892. Under either a rational connection or a reasonable doubt standard, the statutory presumption survives, for a juror presented with these basic facts could surely find the presumed fact beyond a reasonable doubt. *Cf. Turner* v. *United States,* 396 U.S. 398, 416 (1970); *Barnes* v. *United States,* 412 U.S. 837, 843 (1973).

Finally, appellants challenge the way in which the trial judge interpreted § 892. The court's instruction that the government "can prove" the loan extortionate by establishing the basic facts, they argue, may have misled the jury into thinking that its autonomy was limited. In fact, the jurors were free to ignore the presumption, even if they believed that the four basic facts had been proved. We agree that the judge's language was unfortunate; it would have been better to let the jury draw its own conclusions from the evidence without any prompting from Congress or the

[3] The statute speaks of "prima facie evidence" and not of a presumption. In an ideal statute, the two terms would have distinguishable meanings. *See, e.g.,* National Commission on Reform of Federal Criminal Laws, *Study Draft* §§ 103 (4) & (5), quoted in *Weinstein's Evidence* ¶ 303[8]. But Congress has not always observed the distinction in the past, and we have no assurance that this statute was drawn with it in mind. *Cf.* Advisory Committee's Note, Supreme Court Standard 303, quoted in *Weinstein's Evidence* ¶ 303. *See also* 1968 U.S. Code Cong. & Ad. News 2026-27.

court. And if the presumption had been mentioned at all, the jury should have been told that they were not bound by Congress's determination (although the basis of Congress's determination could have been explained). *United States* v. *Gainey,* 380 U.S. 63 (1965); *United States* v. *Crespo,* 422 F.2d 718 (2d Cir.), *cert. denied,* 398 U.S. 914 (1970). Nonetheless, the court was technically correct in saying that the government "can" prove its case against the appellants by establishing the four factors of § 892(b); we have already pointed out that finding these factors would justify a guilty verdict. Moreover, unlike the instruction in *United States* v. *Gainey, supra,* the judge's charge did not impinge on the appellant's Fifth Amendment privilege. Finally, taking the instruction as a whole, we do not think that this passage reduced the jurors' awareness of their responsibilities and discretion. Before the disputed remarks, the court had clearly set forth the "essential elements" of the crime,[4] and within minutes after the disputed remarks, the court repeated that the jury had a duty "to determine whether the government has proven what I told you were essential elements beyond a reasonable doubt."

The next error that the appellants find in the instructions is the statement that "[i]t is only necessary that the government prove that there will be a reasonable basis on which the borrower Peter Pallotta, could have based his fear that default or delinquency on his part could result in harm to him." Out of context, these words could be error, for they seem to permit a conviction if the debtor

[4] "There are three essential elements which must be proven beyond a reasonable doubt as to each defendant as to Count 2: First, that he made an extension of about $700 to Pallotta; secondly, that there was an understanding between the defendant and Pallotta, express or implied, tacit or otherwise, that if Pallotta delayed in making his repayments or there was a total failure to repay, that violence or other criminal means would be used to harm Pallotta; and, thirdly, in so doing the defendant acted knowingly, willfully and unlawfully."

had reasonable grounds for expecting violence — even if the debtor had no subjective expectation of violence. However, the judge did introduce a subjective element into the charge by speaking of "his" fear rather than "a" fear. The context further neutralizes any danger of misinterpretation. The preceding sentence was: "I want to instruct you . . . that the existence of explicit threats is not required in order for the government to prove the victim's understanding that there was a possibility of harm to him if he didn't make his payments." The judge was merely contrasting explicit threats with implicit ones. *United States* v. *Annoreno, supra,* 460 F.2d at 1309. In fact the judge was again being more generous than the statute might permit in requiring a reasonable basis for the debtor's understanding that default would be met with violence.

Appellants also find errors of omission in the charge. The chief government witness was an informer who had contradicted on the stand some of his earlier statements. The court cautioned the jury to weigh the credibility of each witness carefully, and to consider any interest the witness had in the outcome of the case. Appellants believe that these words were inadequate, but we see no error in refusing to give a more detailed charge on credibility. Contradictions in the witness's testimony were thoroughly explored on cross-examination, as was any possible bias arising from the witness's relationship with the government. Ordinarily the jury can be expected to take full account of such matters without more instructions than were given here. If the court had decided to give a more elaborate charge, we would not have disturbed his decision, but neither will we disturb his decision not to do so.

The court also refused to tell the jury that extortion, not usury, was the essence of the crime charged. Such an

instruction may be appropriate in some cases to avoid any confusion arising from the trial or counsels' arguments. But in this case, the high rate of interest received very little emphasis, while considerable attention was directed toward the appellants' threat of violence.

Appellants also contest several evidentiary rulings. The judge allowed testimony on appellant DeVincent's twenty-year-old conviction for armed robbery and his ten-year-old murder indictment. Normally, appellant's objections to this testimony would be well taken. Neither of the events could be admitted to show that DeVincent was a bad man. If known to the debtor, however, they can be admitted to show an element of the crime — the understanding of the debtor that default would be punished with violence. The debtor's awareness of the lender's earlier conviction, or even indictment, for a violent crime surely affects his view of the lender's likely collection practices. F.R.E. 404(b). Both of the revelations came while the debtor was being asked what he knew about the creditors at the time of the loan. Moreover, during this testimony the judge frequently warned the jury that the convictions and indictment were relevant only to the borrower's "frame of mind, in terms of whether or not he had an apprehension he would suffer if he didn't pay this loan. [The past acts are] admitted for no other purpose." We have qualms still, for this testimony was remote and cumulative; the debtor had already testified that he knew DeVincent as a "head-crusher, loanshark enforcer". He also testified that he knew DeVincent and Visconti had been convicted of loan-sharking. But the court, under these circumstances, may have reasoned that the testimony making these matters remote and cumulative also reduced their prejudicial impact. We cannot say the court committed reversible error in admitting the evidence or in refusing to consider

all testimony of this sort at a preliminary hearing, though the latter course might have avoided the present problem by revealing that the disputed evidence was redundant.

Appellants raise a number of other evidentiary issues. We have considered them carefully and find them to be without merit. The court's rulings were all proper exercises of a broad discretion. F.R.E. 403, 608(b); *United States* v. *Honneus*, 508 F.2d 566, 573 (1st Cir. 1974).

Affirmed.

Appendix B.

UNITED STATES CODE

TITLE 18

Crimes and Criminal Procedure

Chapter 42. Extortionate Credit Transactions

Section 891. Definitions and rules of construction

For the purposes of this chapter:

(1) To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

(2) The term "creditor", with reference to any given extension of credit, refers to any person making that extension of credit, or to any person claiming by, under, or through any person making that extension of credit.

(3) The term "debtor", with reference to any given extension of credit, refers to any person to whom that extension of credit is made, or to any person who guarantees the repayment of that extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person to whom that extension of credit is made to repay the same.

(4) The repayment of any extension of credit includes the repayment, satisfaction, or discharge in whole or in part of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

(5) To collect an extension of credit means to induce in any way any person to make repayment thereof.

(6) An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(7) An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(8) The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and territories and possessions of the United States.

(9) State law, including conflict of laws rules, governing the enforceability through civil judicial processes of repayment of any extension of credit or the performance of any promise given in consideration thereof shall be judicially noticed. This paragraph does not impair any authority which any court would otherwise have to take judicial notice of any matter of State law.

Added Pub. L. 90-321, Title II, Section 202(a), May 29, 1968, 82 Stat. 160.

Section 892. Making extortionate extensions of credit

(a) Whoever makes any extortionate extension of credit, or conspires to do so, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, if it is shown that all of the following factors were present in connection with the extension of credit in question, there is prima facie evidence that the extension of credit was extortionate, but this subsection is nonexclusive and in no way limits the effect or applicability of subsection (a):

(1) The repayment of the extension of credit, or the performance of any promise given in consideration thereof, would be unenforceable, through civil judicial processes against the debtor

(A) in the jurisdiction within which the debtor, if a natural person, resided or

(B) in every jurisdiction within which the debtor, if other than a natural person, was incorporated or qualified to do business

at the time the extension of credit was made.

(2) The extension of credit was made at a rate of interest in excess of an annual rate of 45 per centum calculated according to the actuarial method of allocating payments made on a debt between principal and interest, pursuant to which a payment is applied first to the accumulated interest and the balance is applied to the unpaid principal.

(3) At the time the extension of credit was made, the debtor reasonably believed that either

(A) one or more extensions of credit by the creditor had been collected or attempted to be collected by extortionate means, or the nonrepayment thereof had been punished by extortionate means; or

(B) the creditor had a reputation for the use of extortionate means to collect extensions of credit or to punish the nonrepayment thereof.

(4) Upon the making of the extension of credit, the total of the extensions of credit by the creditor to the debtor then outstanding, including any unpaid interest or similar charges, exceeded $100.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence of any of the circumstances described in subsection (b) (1) or (b) (2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing the understanding of the debtor and the creditor at the time the extension of credit was made, the court may in its discretion allow evidence to be introduced tending to show the reputation as to collection practices of the creditor in any community of which the debtor was a member at the time of the extension.

Added Pub. L. 90-321, Title II, Section 202(a), May 29, 1968, 82 Stat. 160.

Supreme Court, U. S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1078

RICHARD DeVINCENT,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONERS

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SUPPLEMENTAL BRIEF OF PETITIONERS

Since the filing of the Petition for Certiorari in this case, the United States Court of Appeals for the First Circuit has issued an opinion in another case, not yet reported,[1] which helps to resolve an apparent dispute between the Respondent United States and the Petitioners as to the interpretation of the First Circuit's opinion below.

[1] *United States* v. *Martorano* (1st Cir., Docket No. 76-1372, March 30, 1977). The full text of the opinion is presented in Appendix A.

In the Petition for Certiorari, it was asserted (at page 8) that the First Circuit's summary affirmation of the constitutionality of the statutory presumption in 18 U.S.C. Section 892(b) completely ignored the proscription in *Michelson* v. *United States,* 355 U.S. 469, 475-76 (1948), against the use of reputation as a part of the government's case-in-chief to prove a defendant's propensity to commit the crime with which he is charged.

Section 892(b) lists four factors which, if found to coexist, constitute "prima facie evidence" of the "extortionate" nature of a credit transaction.[2] But Section 891(6) of the statute defines "extortionate" as having two elements: one relating to the creditor's understanding of the transaction; the other to the debtor's understanding.[3] Thus, analytically, there are at least two inferences embodied in the structure of Section 892(b).

The third of the four factors in Section 892(b) is:

> "(3) At the time the extension of credit was made, the debtor reasonably believed that either
>
> (A) one or more extensions of credit had been collected or attempted to be collected by extortionate means, or the nonrepayment thereof had been punished by extortionate means; or
>
> (B) the creditor had a reputation for the use of extortionate means to collect extensions of credit or to punish the nonrepayment thereof."[4]

[2] The full text of Section 892(b) appears in Appendix B of the Petition for Certiorari.

[3] Section 891(6) also appears in full in Appendix B of the Petition.

[4] The other three factors relate to: the civil uncollectibility of the extension of credit (b) (1); a rate of interest in excess of 45% per annum (b)(2); and an amount extended in excess of $100 (b)(4).

It is the position of Petitioners that the use of a creditor's reputation (or the debtor's beliefs about his reputation, at least in the absence of showing that the creditor was aware of those beliefs) to infer the creditor's understanding as an element of the crime is prohibited by *Michelson.* The failure of the Court of Appeals to isolate factor three from the inference as to the creditors' (Petitioners') reputations under the statutory presumption amounted *sub silentio* to employing the reputations of the Petitioners to prove their states of mind. (Petition, at page 9). While it was suggested in the Petition (at page 9) that the failure might have been inadvertent, it seemed clear that the Court of Appeals had examined Section 892(b) as involving no more than a single inference from four basic facts to one presumed fact, the "extortionate" nature of the transactions.

In the Brief for the United States in Opposition (at page 5), the government accused the Petitioners of misinterpreting the opinion of the Court of Appeals. The government makes the suggestion (at pages 7-8), that, rather than employing the Petitioners' reputations to prove their states of mind in contravention of *Michelson, supra,* the Court of Appeals was merely echoing the "commonsense conclusion" of Congress[5]—which isolated the separate inferences in Section 892(b)—that the overall inference of the use of extortionate means was strong enough to be constitutionally permissible.

Recently, the Court of Appeals for the First Circuit

[5] The passage from the Conference Report (No. 90-1397) in which Section 892(b) is discharged is quoted in the Brief of the United States in Opposition, at 7, and (in part) in the Petition for Certiorari, at 7-8. The Court of Appeals' summary affirmation of the constitutionality of Section 892(b) appears: in Appendix A of the Petition for Certiorari, at 4a; in the Petition itself, at 8; and in the Brief in Opposition, at 7-8.

issued an opinion, not yet reported, in a related[6] prosecution for extortionate credit transactions. *United States* v. *Martorano*, ___ F.2d ___ (1st Cir., Docket No. 76-1372, March 30, 1977). (A copy of the full opinion is attached hereto as Appendix A). In that opinion (also authored by Coffin, C.J.) the Court of Appeals leaves no doubt as to its view that a debtor's testimony concerning his beliefs about a creditor's reputation may be used to infer the creditor's intent. In the course of a discussion about the propriety of considering a victim's state of mind under a charge of conspiracy,[7] the Court in *Martorano* makes the statement:

> "Under 892(b), the victim's understanding is one of the factors from which the jury may infer the lender's intent . . ." *United States* v. *Martorano, supra,* at 8 (Footnote 3).

The reference to Section 892(b) in this context can only be a reference to Section 892(b)(3) inasmuch as that is the only part of that section which deals with the understanding of the debtor. Thus the Court of Appeals in *Martorano* is stating explicitly that which was only implicit in the opinion below; that all four of the enumerated factors in Section 892(b) may be used as the basic facts from which the understanding of creditor is inferred under the statute.

---

[6] Both that case and the instant case grew out of events in the District of Massachusetts which occurred during approximately the same time period, and the debtor and principal government witness in both instances was the same man, Peter Pallotta.

[7] The *Martorano* opinion does include a brief discussion of Section 892(b) and also cites the opinion below (*Martorano, supra,* at 5-6), but having already decided the constitutionality of Section 892(b) the Court confined his remarks to the application of that section. Curiously, although Martorano was tried by the same District Judge (Caffrey, C.J.) as were the Petitioners, there was no instruction given to the jury on the Section 892(b) presumption at the Martorano trial.

Thus there is no longer much doubt that the Court of Appeals in fact rejected the view, based on *Michelson* and the Congressional analysis in the Conference Report, that Section 892(b) contains not one but two statutory inferences, each of which must be measured separately against the constitutional limitations of the Due Process Clause.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 76-1372

UNITED STATES OF AMERICA,

APPELLEE,

v.

JAMES MARTORANO,

APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. ANDREW A. CAFFREY, *U. S. District Judge*]

Before COFFIN, *Chief Judge*,
ALDRICH and CAMPBELL, *Circuit Judges*.

Joseph S. Oteri, with whom *Oteri & Weinberg*, *Alan M. Dershowitz*, *Jeanne Baker*, and *Rosenberg, Baker & Fine* were on brief, for appellant.

Dennis A. Winston, Attorney, Department of Justice, with whom *James N. Gabriel*, United States Attorney, *Martin Boudreau*, Special Attorney Boston Strike Force, and *Mervyn Hamburg*, Attorney, Department of Justice, were on brief, for appellee.

March 30, 1977

COFFIN, *Chief Judge*. James Martorano appeals from the judgment of conviction which was entered against him on each count of a four count indictment. Counts one and two charged appellant with conspiring to make, and with making, an extortionate extension of credit in violation of 18 U.S.C. § 892(a). Count three charged conspiracy to use extortionate means to collect an extension of credit in violation of § 894(a). Count four charged appellant with one particular act of using extortionate means to collect an extension of credit. Appellant challenges the sufficiency of the evidence to support the convictions on each of the four counts, and he argues that the district court made a number of erroneous evidentiary rulings. We affirm.

The charges in this case stem from a loan appellant allegedly made to one Peter Pallotta. The government's evidence, viewed in the light most favorable to it, reflects the following. Pallotta had been running a highly unsuccessful nightclub, and, in late August or early September, 1974, he found himself in need of $2000 to pay some pressing debts. Pallotta's brother took him to see appellant, who agreed to make Pallotta a $2000 loan at five percent interest per week. Told by appellant to return to pick up the money, Pallotta came back the next day and met with appellant and one Matera. Appellant gave Pallotta the money and instructed Matera to go to Pallotta's club each Friday at 7:30 to pick up the weekly payments. No papers were signed, and no collateral was given.

During the next four weeks, Pallotta made the interest payments as follows: once he paid appellant at appellant's club; twice Matera came to Pallotta's club and picked up the money, and once Matera and one Pagano together came to Pallotta's club and received the payment. Sometime in October, Pallotta was forced to close his club for renovations for four weeks, and during this period he did not make any payments. The club reopened on October 30. On that night, appellant and co-defendant Halloran, who was acquitted on all the charges, appeared at Pallotta's club. Because he feared the embarrassment of a beating in his own club, Pallotta left. The next day Pallotta received a telephone call from an unnamed source warning that Pallotta should make himself available to appellant that night. That night Halloran allegedly approached Pal-

lotta in the parking lot outside the club and said that appellant had sent him to get the money. When Pallotta protested that he had no money, Halloran pulled a gun, took Pallotta with him inside the club, and removed some $450 from two separate cash boxes.

Three days later, Pallotta went to see appellant, who asked Pallotta what he was going to do. When Pallotta responded that he had to pay, appellant responded: "Don't be late and see me every week and if you're not going to be here, I want a phone call from you."

Sometime shortly thereafter, Pallotta's club was permanently closed. Because he lacked a source of income and feared physical harm at the hands of several loan sharks, including appellant, Pallotta went into hiding and began living in his car. In late November, 1974, Pallotta contacted the FBI. With Pallotta's consent, the FBI recorded a series of telephone conversations of Pallotta with Halloran, Matera, Pagano, and appellant. In their conversation appellant suggested that Pallotta stop by and see him. When Pallotta expressed his fear of being harmed, appellant replied:

"Don't talk like that on the phone.

. . . .

You can come any time. What do you think I'm gonna do something 'round my own place? Be kind of stupid wouldn't it? Ah, first chance you get drop by and see me."

The conversations between Paallotta and Pagano generally verified the existence of the loan and revealed that Pagano and Matera had supplied half of the money which had been loaned Pallotta.

At the trial Pallotta testified as to the reputations of each of the various individuals who allegedly were involved in the transaction. Pallotta testified that appellant was a loan shark and was "100 per cent in getting his collections

back . . . . Nobody missed. If they did, they got hurt." As to Matera and Pagano, Pallotta testified that they had worked together in a loan shark operation for many years and that if any of their borrowers were ever late in repaying a loan, they would hurt the borrower. Pallotta also stated he had known Halloran for a long period of time and that Halloran was "a loan shark, collector and enforcer and a madman" and that he collected for appellant. This reputation testimony was all admitted subject to the limitation that it could be considered only as to Pallotta's state of mind. Finally, Pallotta testified that at the time he accepted the extension of credit he knew he would be physically harmed if he failed to repay on time.

I. *Sufficiency of the Evidence*

Section 892 proscribes the making of extortionate extensions of credit, which § 891(6) defines as "any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making the repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person." Appellant attacks his conviction under count two on the theory that the record is entirely void of any evidence indicating that he understood that Pallotta's failure to make timely repayments could result in the use of force or violence against Pallotta. The short answer to this argument is § 892(b), which declares that there is prima facie evidence that an extension of credit is extortionate if the following facts exist: (1) repayment is unenforceable through normal judicial processes; (2) the loan's interest rate is in excess of 45 percent per year; (3) the amount of the loan exceeds $100; and (4) the borrower reasonably believed either that the lender has used extortion to collect other debts or that the lender has a reputataion for doing so. There plainly

was evidence from which the jury could conclude that each of these factors was present. Since there is no constitutional bar to permitting a jury to infer from the coexistence of these four facts that the lender understands that violence will follow nonrepayment of the loan, *United States* v. *De Vincent*, 546 F.2d 452, 455 (1st Cir. 1976), we conclude that there was sufficient evidence of appellant's guilt.

Appellant recognizes the force of this argument, but urges that we may not affirm on this theory because the jury was not expressly instructed in terms of § 892(b)'s permissive inference. This contention is without merit. The court's charge to the jury stated that appellant could not be found guilty unless the jury found beyond a reasonable doubt that the aforementioned extension of credit had occurred and that Pallotta had a reasonable apprehension he might suffer harm if he failed to make his payments on time. The judge noted that the rate of interest on the alleged loans was to be 260 percent and that there were no legal means by which appellant could have collected the loan, and he told the jury that it could give "such weight as [it deemed] appropriate" to these facts. This portion of the charge apprised the jury of § 892(b)'s permissive inference without needlessly confusing them with the concept of "prima facie case". Appellant did not object to this portion of the charge, and since the charge cannot be said to be plain error, appellant may not attack the judgments of conviction on count 2 on this ground.[1]

But we need not rest our decision on this ground alone, for there was evidence from which the jury could infer that appellant understood that violence would accompany the repayment of this loan. The statements appellant made during the recorded telephone conversations could suggest

[1] Here, as in *United States* v. *De Vincent, supra,* the judge's charge left no doubt but that the ultimate fact which was in issue was whether an extortionate extension of credit had occurred.

to reasoning minds that the use of violence against borrowers, like Pallotta, who had failed to make timely payments, was a familiar practice for appellant and, indeed, that it was such a familiar practice that he feared that the government might be investigating him.[2] These statements, together with the nature of the loan and the other facts in evidence, warranted a jury conclusion that appellant did in fact understand that violent measures might be employed if Pallotta failed to make a repayment.

It having been established that appellant loaned the money to Pallotta with the understanding that any delay in the repayment thereof could result in the use of violence, the next question we must face is whether there was sufficient evidence on count one, which charged that appellant conspired with Halloran, Matera, or Pagano to make this extortionate extension of credit to Pallotta. We focus on Matera, and we find ample evidence supporting the jury verdict.

Matera, who had a reputation as a loan shark in his own right, collected the weekly interest payments from Pallotta for appellant. While the fact of having made collections as such might not be sufficient to make one a co-conspirator, *cf. United States* v. *Annoreno,* 460 F.2d 1303, 1309 (7th Cir. 1972), here the jury could have reasonably concluded that Matera was not simply appellant's errand boy, but that he was privy to the terms of the extension of credit, was the principal collector, and must have shared appellant's understanding that violence might follow if Pallotta failed to make a repayment. Because Matera was present at the time Pallotta received the $2000 from appellant and because he also made the weekly interest pay-

[2] We recognize that these statements were made several months after the loan, but we see no problem with using them as evidence of appellant's state of mind at the time of the original extension of credit. *See generally* 6 Wigmore on Evidence § 1732 at 103.04.

ment collections, there was evidence from which the jury could infer that Matera knew it was a $2000 loan at 260 percent interest which had not been documented in writing and which had not been secured by any collateral. As the man responsible for the weekly collections, we think the jury was also entitled to assume that he understood both from appellant and from the nature of the loan that violent measures might have to be used to ensure that repayments occurred as scheduled.[3]

Count four charged Martorano with having used extortionate means to collect an extension of credit by ordering Halloran to "burglarize" Pallotta's club on or about October 31, and count three charged him with conspiracy to collect an extension of credit by extortionate means. The record plainly contains substantial evidence both that a "larceny" occurred and that it was at appellant's direction. There would seemingly be no question but that the judgments of conviction on both counts were supported by sufficient evidence.

A problem arises, however, because the jury acquitted Halloran on both counts three and four. Appellant urges that the jury must be taken as having rejected Pallotta's account of Halloran's actions. He contends that the guilty verdict on count four must be set aside because Pallotta's

[3] The district court's unobjected to instructions on the conspiracy counts referred to Pallotta's fearful state as an element of the crime. Appellant argues that this instruction was plain error because the actual understanding of the victim need not be proved to establish conspiracy to make an extortionate extension of credit. *See United States* v. *Annoreno, supra* at 1309 n. 7. We find no plain error. Although appellant is correct that the ultimate fact to be proved under a conspiracy count is the intent of the alleged co-conspirators, it is not necessarily the case that the mental state of the victim is irrelevant to this determination. Under § 892(b), the victim's understanding is one of the factors from which the jury may infer the lender's intent, and we cannot say it was plain error for the district court to permit the jury to consider the victim's understanding in this context as well.

account of Halloran's actions is the only evidence against appellant and that the conspiracy conviction under count three may not be upheld on the theory he conspired with Halloran. Appellant understands that it has been settled in the federal courts since *United States* v. *Dunn,* 284 U.S. 390 (1932) that a jury verdict may not be set aside on the ground that it is inconsistent with a second verdict that was simultaneously rendered, *see also Hamling* v. *United States,* 418 U.S. 87, 101 (1973), but he argues that there should be an exception to this general rule here where, in his view, the court's instructions permitted the jury to return a guilty verdict against Martorano only if it first found Halloran guilty.

Even if we were disposed to create such an exception to the rule of *United States* v. *Dunn,* it would not aid appellant. While it is true that the district court's charge at one point stated that appellant should be found guilty if the jury concludes that Halloran had gone to Pallotta's club at appellant's direction, the thrust of the charge was that appellant should be found guilty if he performed the illegal act through the agency of another person. A major issue at the trial was whether there was sufficient evidence identifying Halloran as the assailant—this being one aspect of Pallotta's account which was not corroborated by the witnesses inside the club. Here, the jury could have consistently reached its verdicts by accepting every aspect of Pallotta's testimony except the portion that identfiied Halloran as the assailant.[4]

But we need not rest our decision on this ground. The

[4] The judge's instructions indicated that the indictment stated the actual charges. Both counts three and four referred to unknown individuals who had been involved in the alleged criminal activity. The jury verdicts thus would have been consistent with the judge's charge if the jury had concluded that appellant's agent and co-conspirator was not Halloran but one of the unknown individuals referred to in the indictment.

settled rule in the federal system is that it is the prerogative of the jury *simultaneously* to return inconsistent verdicts. We have been cited to no case which recognizes the exception appellant urges us to adopt, and any such exception, in our view, would be both unwise and arguably inimical to the interests of criminal defendants generally. The present rule permits the jury to enter into compromises and to act out of leniency; if it were to be changed, the jury would have to be instructed that any inconsistencies in their verdicts would vitiate any guilty verdicts they might return, and the net result might be that fewer defendants would be acquitted on individual counts. And such an exception would be unwise. The jury's deliberations have always been regarded as sacrosanct, and the adoption of appellant's proposed exception would undermine the strong policy against probing into the jury's logic or reasoning and would open the door to interminable speculation.[5] *See United States* v. *Zane*, 495 F.2d 683, 690 (2d Cir. 1974). Accordingly, we decline to accept appellant's invitation.

II. *Evidentiary Rulings*

1. As we have noted, the district court permitted Pallotta to testify concerning Martorano's reputation for collection practices. Appellant does not object to the introduction of this testimony *per se*, but he argues, first, that the district court erred in admitting the testimony without first conducting a voir dire to determine the reasonableness of the answers Pallotta was to give and, second, that it compounded the error by prohibiting appellant from test-

[5] The cases appellant relies upon, *see Sealfon* v. *United States*, 322 U.S. 575 (1948); *cf. United States* v. *Zane*, 495 F.2d 683, 691-92 (2d Cir. 1974), involve the very different situation in which a prior jury verdict is held to have a res judicata effort and to bar a *subsequent* prosecution.

ing the reasonableness and basis for the reputation testimony. Neither contention has merit.

Under general principles of evidence law, reputation testimony is properly admitted if the witness is shown to live and work in the same community as the subject of the testimony and if the witness is familiar with the subject's reputation for a particular pattern of behavior. *See Whiting* v. *United States*, 296 F.2d 512, 517 (1st Cir. 1961) and authorities cited. Common law evidence principles do not require the judge to make a preliminary determination concerning the reasonableness of any particular answer. Here, the admission of the reputation evidence was authorized by § 892, and it does not purporte to create a contrary rule.[6] *See generally United States* v. *Bowdach*, 501 F.2d 220, 225-26 (5th Cir. 1974). In the absence of any such provision, we assume Congress intended that these provisions be administered in accordance with normal evidentiary practice, and, under it, the admission of Pallotta's reputation testimony was entirely proper.

Appellant's second contention is based upon the district court's refusal to permit him to ask Pallotta the names of the individuals who had told him about appellant's collection practices. We observe that a party, of course, has the right to attempt to impeach or challenge any testimony concerning the reputation of an individual. And here, where the borrower's reasonable belief regarding the lender's reputation for collection practices could have direct

[6] Section 892(c) establishes several preconditions to the introduction of reputation testimony by witnesses other than the borrower, but there is no requirement that there be a preliminary showing that the answers are reasonable. *See also* § 894(c). Section 892(b)(3)(B) authorizes the debtor to testify as to the lender's reputation, *see United States* v. *Bowdach*, 501 F.2d 220, 225-26 (5th Cir. 1974). While this provision gives direct substantive significance to the debtor's reasonable belief as to the creditor's reputation, nothing therein suggests that the admissibility vel non of the borrower's testimony is to be governed by a special rule.

substantive significance, *see* § 892(b), there is a particularly compelling need for permitting a defendant to explore the basis for such belief or otherwise to challenge the debtor's testimony. But we believe the district court was entirely warranted in precluding inquiry into the specific individual sources of Pallotta's belief. There were a number of available, traditionally accepted devices by which appellant could have cast doubt on the reasonableness of Pallotta's belief: e.g., asking Pallotta whether he "had heard" of acts which were inconsistent with the testimony, introducing testimony as to appellant's reputation which was contrary to Pallotta's, or possibly, as appellant did below, introducing evidence of specific acts which were inconsistent with this supposed reputation. The availability of these gave appellant fully adequate protection.

Inquiry into the specific sources of Pallotta's belief was not only unnecessary to protect appellant; it would have availed appellant little. Even if the questioning had been allowed, it would have been unthinkable for the district court to permit the appellant to pursue collateral inquiry as to whether any or all of Pallotta's named sources had actually given him the information regarding appellant. The only possible benefit to appellant from the inquiry would have been that he could have forced Pallotta to state the names of specific individuals who had told him about appellant. We think there was good reason to deny appellant this minimal safeguard. The further inquiry could have involved the tedious and time consuming process of hearing all the sources of Pallotta's belief, and it possibly would have created a danger of some kinds of reprisals. We think the district court was well within its discretion. *Cf.* Fed. R. Evid. 403.

2. At trial the court permitted the government to introduce the statements Matera and Pagano made during

co-conspirator exception to the hearsay rule. Appellant recorded telephone conversations with Pallotta under the objects that there had not been a sufficient prior showing that a conspiracy existed. We find no error.

We recently indicated our view that the new federal rules of evidence, which were in effect at appellant's trial, introduced significant changes in the administration of the co-conspirator exception to the hearsay rule. *See United States* v. *Petrozziello,* — F.2d — (1st Cir. Jan. 21, 1977). Without repeating what we said in that case, we read the new rules as committing the question of the admissibility of the statements of an alleged co-conspirator exclusively to the trial judge. The district court will admit the hearsay declarations if he determines, by a preponderance of the evidence, that a conspiracy existed, that the declarant and the defendant were members of it at the time the statements were made, and that the declarant's statements were made in furtherance of the conspiracy. *See* Fed. R. Evid. 104(a), 104(b), 801(d)(2)(E). The new rules permit a trial judge to base his determination on hearsay and other inadmissible evidence, including perhaps the very statement seeking admission. Fed. R. Evid. 104(a); *see United States* v. *Petrozziello, supra* at — n. 2 (slip op. at 5 n. 2).

Here, the trial court made a preliminary determination that there had been a sufficient showing of conspiracy to permit the introduction of the statements of Matera and Pagano, and it followed the pre-federal rules practice of instructing the jury that it could not consider the statements unless it first found that the independent nonhearsay evidence established the existence of a conspiracy beyond a reasonable doubt. Naturally, the only question we must now review is whether the district court erred in making the threshold determination that there had been a sufficient showing that a conspiracy existed to place the statements before the jury. *See United States* v. *Petrozziello, supra*

at — (slip op. at 6) In making this decision, it seems that the district court may have followed the federal rules to the extent of considering evidence other than the independent nonhearsay variety: it allowed the government to argue in favor of the admissibility of some of the statements by referring to the evidence of a conspiracy contained in the statements seeking admission. Although the district court did not make an explicit finding that a conspiracy existed between appellant and the two declarants, appellant requested no such finding and, in view of the fact that *Petrozziello* had yet to be decided, this was not plain error. *See id.* The sole question we need consider on appeal is whether there was sufficient evidence under Fed. R. Evid. 104(a) to support a finding that a conspiracy existed.

We have already detailed the evidence which was sufficient to permit the jury to find that Matera and Martorano had conspired together. Pagano presents a somewhat closer question. Pallotta testified that he and Matera had been partners in a loan shark operation for years,[7] testimony which was corroborated by the surveillance records. While this fact alone does not establish that Pagano was a member of the Martorano-Matera conspiracy, there is the additional fact that Pagano and Matera together went to Pallotta's club to collect one of the interest payments. In view of the evidence that the two men were long-time loan shark partners, we think it reasonable to infer that Pagano's presence on this particular occasion was not a coincidence, but rather was because Pagano was taking part in this particular extortionate extension of credit. While this independent, nonhearsay evidence of Pagano's involvement is not terribly compelling, we think the district court

[7] Although this evidence was admitted subject to the limitation that it could only be considered as to Pallotta's state of mind, Fed. R. Evid. 104(a) permits the district court to consider such statements for their truth in determining the existence of the preliminary fact of the existence of a conspiracy.

could properly take account of a fact which was revealed by the statements seeking admission: that Pagano and Matera had supplied half the money which Martorano gave Pallotta. This additional fact, when considered together with the independent nonhearsay evidence, provides a solid basis for a district court's conclusion that Pagano and appellant were involved in a conspiracy.

We are aware that *United States* v. *Glasser*, 315 U.S. 60, 74-75 (1942), rejected the view that the existence of a conspiracy could be proved by the very statement seeking admission. The new rules, however, explicitly contemplate the consideration of such hearsay evidence in making preliminary findings of fact. We believe the new rules must be taken as overruling *Glasser* to the extent that it held that the statement seeking admission cannot be considered at all in making the determination whether a conspiracy exists. *Glasser*, however, still stands as a warning to trial judges that such statements should ordinarily be given little weight. Here, where there is significant independent evidence of the existence of a conspiracy and where the statement seeking admission simply corroborates inferences which can be drawn from the independent evidence, we see no problem with the consideration of that statement.

We also are not persuaded by appellant's further argument that the tapes affirmatively disclose that Pagano had withdrawn from the conspiracy and that his declarations thus did not fall within the ambit of the co-conspirator exception. In the conversations, Pagano expressed his willingness to help arrange further payments to appellant, and we think the district judge reasonably inferred that Pagano was still a member of the conspiracy.

3. Next, appellant argues that the district court committed reversible error by refusing to permit him to cross-examine Pallotta regarding specific threats of harm which

were made by loan sharks other than appellant. Appellant urges that Pallotta's answers to these questions would have tended to show that Pallotta had not been in fear of appellant at all, but rather feared harm solely from other loan sharks. We find no reversible error.

We think it doubtful that Pallotta's fear of other loan sharks was probative of whether he was in fear of appellant, but even if the line of inquiry was a material one, we do not believe appellant can claim any prejudice. It was established at trial that Pallotta was terrified of several loan sharks other than appellant, and there was testimony from a government agent suggesting that these other men were the principal objects of Pallotta's fear. Since the jury was in possession of sufficient information concerning Pallotta's state of mind to make a judgment, the restriction on cross-examination was not reversible error. *See United States* v. *Turcotte,* 515 F.2d 145, 151 (2d Cir. 1975); *United States* v. *Blackwood,* 456 F.2d 526, 530 (2d Cir. 1972).

None of the other points appellant raises require discussion.

The judgment of conviction is affirmed.

Supreme Court, U. S.
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No. 76-1078

In the Supreme Court of the United States

OCTOBER TERM, 1976

RICHARD DEVINCENT and ROBERT VISCONTI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 546 F. 2d 452.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1976. Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including February 4, 1977; the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the statutory list of factors that establish a prima facie case that an extension of credit is extortionate creates a constitutionally invalid "presumption."

2. Whether the district court erred in admitting testimony about the debtor's knowledge that petitioner DeVincent had been indicted for murder.

STATEMENT

After a jury trial in the United States District Court for the District of Massachusetts, petitioners were convicted of conspiring to make and of making an extortionate extension of credit, in violation of 18 U.S.C. 892.[1] Each was sentenced to eight years' imprisonment and fined $10,000.

1. In early 1974 Peter J. Pallotta contacted petitioner DeVincent, seeking money to finance a nightclub (I App. 144-146).[2] Pallotta, who met DeVincent 20 years earlier while both were in prison, knew from a variety of sources, including DeVincent himself, that DeVincent had been convicted of loansharking, had been indicted and acquitted of murder, and had a reputation as a "head crusher" or loanshark enforcer (I App. 158-161, 166). DeVincent agreed to lend Pallotta $700 at "[f]our points, $28 a week," and explained: "Peter, you know, it is bad money" (I App. 147, 150).[3]

Pallotta agreed to pay the $28 interest weekly until he had accumulated $700 with which to make a lump sum repayment of the principal (I App. 151-152). DeVincent directed petitioner Visconti to give Pallotta $700 (I App.

[1]Petitioners were acquitted of a second extortionate extension of credit and conspiracy to use extortionate means to collect the extension of credit.

[2]"App." refers to the three-volume appendix in the court of appeals.

[3]"Bad money" is a loan that must be paid back or the debtor "would be hurt" (I App. 167).

151).[4] Visconti repeated DeVincent's earlier statement that the $700 was "bad money" (*ibid.*).

Pallotta's nightclub business lagged, and he fell behind in his payments. DeVincent called Pallotta, demanded money, and said he would come to see him (I App. 179-180). DeVincent also came to the nightclub and warned Pallotta that he would mutilate him with an ice pick if payment were not forthcoming (I App. 180-181). Frightened, Pallotta began to make double payments (I App. 182-183). When Pallotta again fell in arrears, DeVincent threatened to break Pallotta's legs (I App. 184).

The nightclub eventually failed. Fearing physical injury, Pallotta went into hiding (I App. 190-191). In November 1974 he contacted the Federal Bureau of Investigation and was placed in protective custody. With Pallotta's consent, federal agents recorded three telephone conversations between Pallotta and Visconti and two between Pallotta and DeVincent (*id.* at 191-192). The tapes were played at trial and confirmed that the $700 loan at four percent weekly interest had been made by DeVincent and Visconti (II App. 401, 404-405).[5]

Petitioners' defense was that neither they nor Pallotta had the requisite "understanding" that violence would be used to collect the loan or delinquent payments. Petitioners extensively attacked Pallotta's credibility (see, *e.g.*, I App. 197, 209, 214-215, 287; II App. 476-477, 518-519, 542-544, 559).

[4]Pallotta had not met petitioner Visconti before, but he had heard of his conviction for loanshark activity and his reputation as a loanshark enforcer (I App. 152, 157-158).

[5]Petitioners stipulated that the loan, if made as described, would be uncollectable under Massachusetts law (II App. 434).

2. When the district court charged the jury on the essential elements of 18 U.S.C. 892, it twice repeated the definition of an extortionate extension of credit set forth in Section 891(6), thereby emphasizing that the crimes charged involved "the understanding of the creditor and the debtor" (III App. 684, 685). The court then charged (III App. 689-690; emphasis added):

> I instruct you * * * that in order to sustain this burden of proof * * * the government must prove beyond a reasonable doubt with regard to each defendant the following: (1) That on or about the last week of April, 1974, $700 was loaned or advanced to Peter J. Pallotta by the defendants; and, secondly, that there was an actual deferment of the repayment of that loan with the *mutual understanding on the part of Pallotta and the defendants* that if there were delays in making repayment or a failure to make repayment that violence or other criminal means to cause harm to Pallotta would be employed by the defendants; third, that the defendants knowingly and willfully made the extortionate extension of credit.
>
> There are three essential elements which must be proven beyond a reasonable doubt as to each defendant * * *: First, that he made an extension of about $700 to Pallotta; secondly, that *there was an understanding between the defendant and Pallotta*, express or implied, tacit or otherwise, that if Pallotta delayed in making his repayments or there was a total failure to repay, that violence or other criminal means would be used to harm Pallotta; and thirdly, in so doing the defendant acted knowingly, willfully and unlawfully.

The court told the jury that it could employ a number of permissible inferences in deciding whether petitioners and Pallotta had the requisite understanding. It stated "that a person normally intends the natural and probable consequences of an act he knowingly did or knowingly omitted" (III App. 680) and that (*id.* at 696-697):

> I want to tell you there are two ways in which the government can prove the extensions of credit were extortionate, if you find the extensions of credit were made: The government can prove extensions of credit were extortionate either by direct evidence of the actual belief of Pallotta as to the defendants' collection practices or by establishing the following four facts: [the court then paraphrased the elements of Section 892(b)].

3. The court of appeals affirmed. It held that the four factors enumerated in Section 892(b)—that the extension of credit could not be collected through lawful processes, that the interest exceeded 45 percent per year, that the debtor knew that the creditor had made other extortionate loans, and that the loan exceeded $100—if established, would support a conclusion beyond a reasonable doubt that petitioners and Pallotta had the requisite understanding (Pet. App. 4a-5a). The court of appeals also considered and rejected petitioners' numerous objections to the introduction of evidence (*id.* at 7a-8a).

ARGUMENT

1. Petitioners contend (Pet. 6-11) that the use of the four factors enumerated in 18 U.S.C. 892(b) creates a "presumption" of guilt that is prohibited by the Due Process Clause. Petitioners concede (Pet. 10), however, that the instant case is the first to consider such an argument. In the absence of a conflict among the circuits, there is no reason for review by this Court. Petitioners, moreover, misinterpret both the statutory scheme and the opinion of the court of appeals.

Section 892(b) provides that if the jury finds four factors—(1) that repayment of the loan is civilly unenforceable; (2) that the annual interest rate on the loan exceeds 45 per cent; (3) that the debtor reasonably believes when the loan is made that the creditor has used or has a reputation for using extortionate means to collect other debts; and (4) that the total amount of the loan exceeds $100—then the prosecution has established "prima facie evidence that the extension of credit was extortionate." The statute elsewhere provides that an extension of credit is extortionate if both debtor and creditor believed at the time the loan was made that force would be used to collect it.

Petitioners contend that the four factors enumerated in Section 892(b) create an unconstitutional "presumption" relieving the prosecution of its burden of proof. They rely primarily upon *Leary* v. *United States*, 395 U.S. 6. But in *Leary* the "presumption" was mandatory, and, as this Court concluded, contrary to fact. Section 892(b), on the other hand, simply enumerates four factors that establish "prima facie evidence" and allow the case to go to the jury, which is free to draw such inferences as are warranted by the evidence. The inferences, moreover, are consistent with experience and therefore do not offend due process principles. *Barnes* v. *United States*, 412 U.S. 837.

The court of appeals held—correctly, we submit—that the factors listed in Section 892(b) are highly pertinent to proving the understanding of the parties, and that if all four factors are established the existence of an understanding that force would be used follows almost inexorably. At a minimum, the presence of the four factors demonstrates the presence of the "understanding" that Congress made criminal; the inferences to be drawn from proof of the four factors, and the meaning of the requirement of an "understanding" about methods of collection, are closely related in the legislative scheme.

In the light of common experience, the inference of the use of extortionate means from the foregoing factors seems strong enough to make it constitutionally permissible to put the burden on the defendant to come forward with evidence to show the innocent nature of the transaction, if such was the case. In arms length transactions, *people simply do not lend sums of money at exorbitant rates of interest under circumstances where they cannot enforce the obligation to repay*. Where the prosecution has shown the absence of legal means to enforce the obligation, it is a reasonable inference, in the absence of evidence to the contrary, that illegal means were contemplated. Any debtor who deals with a creditor under these circumstances, knowing or reasonably believing that the creditor has used extortionate means in the past, may be fairly surmised to know what he is getting into. [H.R. Conf. Rep. No. 90-1397, 90th Cong., 2d Sess. 29 (1968); emphasis added.]

See also *Perez* v. *United States*, 402 U.S. 146, 155-156; *United States* v. *Annoreno*, 460 F. 2d 1303, 1309 (C.A. 7), certiorari denied, 409 U.S. 852. Since the meaning of the requirement of an "understanding" must be viewed in the light of the proof Congress provided would establish that "understanding," the use of the four factors of Section 892(b) satisfies "the reasonable-doubt standard * * * as well as the more-likely-than-not standard, [and] clearly accords with due process." *Barnes* v. *United States, supra*, 412 U.S. at 843.

The court of appeals did not take inconsistent positions by explaining both "that the statute makes the understanding of both the creditor and the debtor crucial" to prove a statutory violation (Pet. App. 3a) and that "[w]hen a man with a reputation for violent collection tactics loans

more than $100 at an exorbitant rate of interest, and the loan cannot be collected by legal means, we think it highly probable that the loan is 'extortionate' within the meaning of §892" (*id.* at 4a). The court has simply stated the same common-sense conclusion that the statute permits.[6]

2. To establish Pallotta's understanding that violence or other criminal means would be used to enforce repayment of the loan, the prosecution presented testimony that Pallotta knew that DeVincent had been indicted for murder. Petitioners moved for a mistrial on the ground that this evidence was prejudicial. Petitioners argued that Pallotta previously had said that he was unaware of the indictment at the time the loan was made. The court denied the motion for a mistrial and instructed the jury that Pallotta's testimony regarding petitioners' past acts could be considered solely to establish Pallotta's state of mind (see I App. 161-166). On cross-examination DeVincent impeached Pallotta with the transcript of a telephone conversation, taped while Pallotta was in protective custody, between Pallotta and another of his creditors, in which Pallotta appeared to know very little about DeVincent's indictment (I App. 293-296). Pallotta explained that he had known about the indictment and was simply trying "to draw out" his other creditor to reveal information that might be useful in a prosecution against that creditor (I App. 294-295, 297).

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[6]Petitioners contend (Pet. 6, 8-9) that the instant case is inconsistent with *Michaelson* v. *United States*, 335 U.S. 469. *Michaelson* involved the introduction of "reputation" evidence in general; the Court explained that the prosecution could not introduce evidence of a defendant's bad deeds or reputation in an attempt to show that, as a "bad man," the defendant was apt to be guilty of crime. Here, by contrast, any use of reputation evidence is explicitly authorized by Section 892(b)(3) because it is pertinent to an element of the offense— the borrower's understanding of the lender's willingness to use force to obtain repayment.

Petitioners now contend (Pet. 11-15) that the district court should have considered Pallotta's prior inconsistent statement in determining whether to admit Pallotta's testimony that he knew of the murder indictment when the loan was made.[7] But the record does not establish that the court failed to take that statement into account.[8] In any event, Pallotta satisfactorily explained the apparently inconsistent statements, and his testimony, if believed, established that he knew of the indictment at the time the loan was made. The jury was repeatedly instructed that the evidence was to be used for only a limited purpose (see Pet. App. 7a), and the district court did not abuse its discretion in admitting it.[9]

---

[7]Pallotta's awareness of the indictment was relevant to establish his understanding regarding the extension of credit only if he had that knowledge when the loan was made.

[8]The record does not support petitioners' allegation (Pet. 13) that the district court "was of the view that the prior inconsistent statements related only to the issue of [Pallotta's] credibility." It was on petitioners' request that the court instructed the jury to consider the prior inconsistent statements solely as impeaching testimony (I App. 296-297).

[9]Petitioners also allege (Pet. 12) that the district court's "refusal to consider Pallotta's prior inconsistent statements on the question of admissibility" conflicts with *United States* v. *Bailey*, 505 F. 2d 417 (C.A.D.C.), certiorari denied *sub nom. Sloan* v. *United States*, 420 U.S. 961; *United States* v. *Clemons*, 503 F. 2d 486 (C.A. 8); *United States* v. *Ostrowsky*, 501 F. 2d 318 (C.A. 7); and *United States* v. *Burkhart*, 458 F. 2d 201 (C.A. 10), which held that the reliability of evidence of prior bad acts must be established before being admitted. In those cases, however, the relevance of the proffered evidence turned on whether the past acts had in fact been committed and not, as here, on the witness's knowledge of those acts. Those cases therefore do not conflict with the instant case. Moreover, petitioners concede (Pet. 13) that DeVincent had been indicted, as Pallotta maintained. In any event, in light of Pallotta's explanation, the evidence was "clear and convincing" that he knew of the indictment when the credit was extended, thus satisfying the standard of proof required in *Clemons*, *Ostrowsky*, and *Burkhart*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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